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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GLOBAL NETWORK INVESTMENTS, LLC, Plaintiff and Appellant, v. OCWEN LOAN SERVICING, LLC, et al., Defendants and Respondents.	B283671 (Los Angeles County Super. Ct. No. BC590111)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Dismissed.

Law Office of Corey Evan Parker and Corey Evan Parker for Plaintiff and Appellant.

Bryan Cave Leighton Paisner, Christopher L. Dueringer and Kazim A. Naqvi for Defendants and Respondents.

Plaintiff Global Network Investments, LLC[1] appeals from an order sustaining defendants (1) Ocwen Loan Servicing, LLC, (2) Wells Fargo Bank, N.A., as Trustee for the Mortgage Investors Trust Loan Asset-Backed Certificate, Series 2004-WMC4, and (3) Western Progressive, LLC's demurrer to plaintiff's second amended complaint and from the resulting judgment of dismissal. Plaintiff contends its filing and service of a motion to reconsider that order and judgment extended the deadline for filing its otherwise untimely notice of appeal, thus preserving our jurisdiction to consider its appeal. Similarly, because its motion for reconsideration referenced Code of Civil Procedure[2] section 473, subdivision (b), plaintiff argues the motion constituted a motion to vacate judgment pursuant to California Rules of Court,[3] rule 8.108(c), which is an independent ground for extending the deadline for filing its notice of appeal.

We conclude plaintiff's appeal is untimely because it did not file its notice of appeal within 60 days after defendants served a notice of entry of judgment. We further conclude plaintiff cannot rely on its motion for reconsideration to extend the deadline for filing a notice of appeal because that motion was not procedurally valid for the purposes of such an extension. In

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[1] Cynergy Group International, LLC and Max Griggs were also plaintiffs in the underlying action but did not appeal the trial court's rulings.

[2] Undesignated statutory citations are to the Code of Civil Procedure.

[3] Undesignated references to rules are to the California Rules of Court.

addition, because plaintiff filed its motion for reconsideration after the trial court entered judgment, the trial court no longer had jurisdiction to consider the motion.

Even if we were to characterize the motion for reconsideration as a motion to set aside judgment under section 473, subdivision (b), the motion was procedurally invalid, and thus did not serve to extend the deadline for filing a notice of appeal. Accordingly, we dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

We forego a detailed recitation of the facts and procedural background, and instead set forth below a brief summary that focuses on the procedural timeline relevant to the jurisdictional issue of timeliness.

On August 4, 2015, plaintiff sued defendants for wrongful foreclosure of certain real property and related claims, including fraud, cancellation of instruments, unfair competition, and breach of the implied covenant of good faith and fair dealing, and alleged defendants wrongfully denied plaintiff a loan modification request. Defendants demurred to that complaint. Plaintiff then filed a notice of intent to file a first amended complaint (FAC), which it filed on July 14, 2016. Defendants then demurred to all 15 causes of action in the FAC. On January 11, 2017, the trial court overruled the demurrer as to the two causes of action before us—negligence and breach of the duty of good faith and

fair dealing—and sustained the demurrer as to all the other causes of action with leave to amend.[4]

On February 1, 2017, plaintiff filed a second amended complaint (SAC) alleging eight causes of action, including the two causes of action before us. Plaintiff did not amend those causes of action to which the trial court had overruled defendants' previous demurrer. On February 6, 2017, defendants demurred to the SAC, including the negligence and breach of the duty of good faith and fair dealing claims that had survived demurrer to the FAC. In opposing the demurrer, plaintiff argued that the trial court had already overruled the demurrer to those causes of action and requested leave to amend in the event the trial court sustained the demurrer as to any or all causes of action.

On March 2, 2017, the trial court sustained defendants' demurrer to all causes of action in the SAC without leave to amend. As to the negligence claim, the trial court ruled defendants owed no duty of care to plaintiff. The claim for breach of the duty of good faith and fair dealing failed because defendants had no obligation to offer and approve a loan modification application.

On March 22, 2017, the trial court entered an order sustaining that demurrer without leave to amend and a judgment

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[4] The trial court's tentative ruling expressly overruled the demurrer to the causes of action for negligence and breach of the duty of good faith and fair dealing. The trial court's minute order is more opaque. Although it incorporates the court's tentative ruling, and recites that the trial court was sustaining the demurrer "in part" with 20 days leave to amend, it omits a discussion of the overruled negligence cause of action.

of dismissal. On March 28, 2017, defendants served a notice of entry of that order and judgment on plaintiffs by mail.

On April 12, 2017, plaintiff filed a motion to reconsider that order and judgment. Plaintiff did not attach a declaration in support of the motion to its moving papers. Plaintiff's counsel, however, attached his declaration to the reply papers. In the motion, plaintiff referenced section 1008, subdivision (a)[5] based on purported new facts, to wit, that plaintiff had the ability to tender the amount due on the loan because it had qualified for new financing.

Plaintiff also cited section 473, subdivision (b) in claiming " 'mistake, inadvertence, surprise or excusable neglect.' " Counsel argued plaintiff never had a chance to amend the causes of action for negligence and breach of the duty of good faith and fair dealing because of the trial court's error in sustaining without leave to amend the demurrer to those causes of action in

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[5] Section 1008, subdivision (a) provides: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

the SAC when the trial court had already overruled the demurrer to the same causes of action in the FAC.

Counsel also argued that at the hearing on the demurrer to the SAC, the trial court gave a tentative ruling overruling the demurrer, but then continued the hearing to the afternoon, at which time the trial court sustained the demurrer without leave to amend because plaintiff did not have the funds "to tender the loan." Plaintiff also asserted the trial court provided no explanation for sustaining the demurrer without leave as to claims for which the trial court had overruled a previous demurrer. Among other relief, plaintiff requested that the judgment be set aside and that the trial court rehear the demurrer to the SAC or allow plaintiff to file an amended complaint. Plaintiff did not attach a proposed amended complaint to its moving or reply papers.

On June 28, 2017, the trial court denied plaintiff's motion, and defendants served plaintiff with notice of that order by mail on the same day. The order states, "Plaintiffs' Motion for Reconsideration is DENIED."

On July 5, 2017, plaintiff filed a notice of appeal of the judgment of dismissal. We observe that date falls 99 days after defendants served the notice of judgment of dismissal. We also observe plaintiff appeals the trial court's rulings regarding only its causes of action for negligence and breach of the duty of good faith and fair dealing. On October 18, 2018, we granted plaintiff's motion to augment the record to include plaintiff's motion for reconsideration and supporting documents.

On March 27, 2019 and April 8, 2019, we requested supplemental briefing regarding the timeliness of plaintiff's appeal, which supplemental briefing the parties filed on April 3, 2019 and April 12, 2019.

DISCUSSION

A. Plaintiff's Appeal Is Untimely Because Plaintiff Did Not File Its Notice Of Appeal Within 60 Days Of Service Of Notice Of Entry Of Judgment

Although no party raised the issue of the appeal's timeliness in its initial appellate briefing, we are dutybound to consider that question because it implicates our jurisdiction. (See *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9.) Indeed, an untimely notice of appeal deprives the appellate court of jurisdiction to consider the appeal. (Rule 8.104(b); *Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1049 (*Branner*).) Courts apply this rule strictly, " 'even to [requests to] relieve against mistake, inadvertence, accident, or misfortune [citations].' " (*Ibid.*) Generally, an appellant must file a notice of appeal within 60 days after service of notice of entry of judgment. (Rule 8.104(a)(1)(B).) The method of service of the notice has no effect on an appellant's time to appeal. (*InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 1134; see, e.g., § 1013, subd. (a) [mail service otherwise extending time to respond to a motion by five days does not apply to notices of appeal].)

Defendants served a notice of entry of judgment, thus triggering the 60-day deadline for filing a notice of appeal.

Defendants served that notice on March 28, 2017, and plaintiff filed its notice of appeal on July 5, 2017. The span between those dates is 99 days, rendering plaintiff's notice of appeal untimely unless plaintiff can avail itself of an extension because of its motion for reconsideration.

B. The Motion For Reconsideration Did Not Extend Plaintiff's Time To Appeal Because Absent A Supporting Declaration Accompanying Its Moving Papers, The Motion Was Not Valid And Because The Trial Court Lacked Jurisdiction To Consider The Motion Once Judgment Was Entered

Rule 8.108(e) extends the time to file a notice of appeal "[i]f any party serves and files a *valid* motion to reconsider an appealable order under . . . section 1008, subdivision (a)." (Italics added.) Specifically, the time to appeal is extended by the earliest of "(1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first motion to reconsider is filed; or [¶] (3) 180 days after entry of the appealable order." (Rule 8.108(e).)

A motion for reconsideration is "valid" for purposes of an extension of time to file a notice appeal if "the motion . . . complies with all procedural requirements; it does not mean that the motion . . . must also be substantively meritorious. . . . [A] timely motion to reconsider (§ 1008) extends the time to appeal from an appealable order for which reconsideration was sought even if the trial court ultimately determines the motion was not 'based upon new or different facts,

circumstances, or law,' as subdivision (a) of section 1008 requires." (Advisory Com. Com. to rule 8.108(b)–(f), Thomson Reuters' Ann. Rules of Court – Volume I (2019 ed.) foll. rule 8.108, p. 516.)

More specifically, a motion for reconsideration is "valid" if the moving papers include, among other requirements, a declaration in support of the motion. (*Branner*, *supra*, 175 Cal.App.4th at pp. 1047–1050.) A party seeking reconsideration "shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (§ 1008, subd. (a).) A later filed declaration does not transform the motion into a valid one even if the trial court accepts the declaration: Allowing such acceptance to extend the time to appeal "would undermine the jurisdictional nature of the appellate time period . . . ." (*Branner*, *supra*, 175 Cal.App.4th at p. 1049.)

Additionally, the trial court must rule on a motion for reconsideration before entry of judgment because entry of judgment divests the trial court of jurisdiction to consider a motion for reconsideration. (*Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1481–1482 (*Safeco*) [referring to former rule 3(d), which is virtually identical to rule 8.108(e)].) This is so even if the trial court proceeded to hear that motion or enter an order on it after entering judgment. (*Safeco*, *supra*, 134 Cal.App.4th at pp. 1481–1482.)

In its supplemental briefing, plaintiff contends its failure to attach a declaration to its motion for reconsideration when filed

does not deprive us of jurisdiction to entertain its untimely appeal. Plaintiff relies on *Jurado v. Toys "R" Us, Inc.* (1993) 12 Cal.App.4th 1615, 1617–1618 (*Jurado*) for this proposition. In *Jurado*, we concluded the omission of a declaration to support good cause for a motion for a trial continuance pursuant to section 595.4[6] was not jurisdictional and was excused by "counsel's oral representations in open court." (*Jurado*, at p. 1618.) The same is not true here where the omission of a declaration from the motion for reconsideration is fatal to our jurisdiction to entertain plaintiff's otherwise untimely appeal. (See *Branner*, *supra*, 175 Cal.App.4th at p. 1049.)

Regarding the trial court's postjudgment jurisdiction, plaintiff contends *Safeco* is inapposite because it involved a judgment of dismissal of a complaint following a grant of summary judgment, and "[a]n entry dismissing a Complaint, unlike one granting summary judgment, does not divest the court of jurisdiction." In support, plaintiff relies on *Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.* (1989) 215 Cal.App.3d 353, 357 (*Annino*) for the proposition that a

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[6] "A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed." (§ 595.4.)

previously dismissed party may have collateral statutory rights that the trial court must enforce.

Annino involved a request for sanctions for bad faith tactics against a dismissed defendant in a multi-defendant lawsuit. The *Annino* court ruled the trial court had jurisdiction to award the sanctions. (*Annino*, *supra*, 215 Cal.App.3d at p. 357.) We fail to see how this case is instructive because it does not obviate the rule that a trial court loses jurisdiction to consider a motion for reconsideration upon entering judgment. Specifically, a "final judgment terminates the litigation between the parties and leaves nothing in the nature of judicial action to be done other than questions of enforcement or compliance. 'Until entry of judgment, the court retains complete power to change its decision . . . ; it may change its conclusions of law or findings of fact. [Citation.] After judgment a trial court cannot correct judicial error except in accordance with statutory proceedings. [Citations.] A motion for reconsideration is not such a motion.' " (*Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1237–1238.)

In sum, plaintiff filed its motion for reconsideration after the trial court entered judgment and did not include a declaration in its moving papers when filed. Thus, plaintiff's motion for reconsideration was not procedurally valid and did not serve to extend the time for filing a notice of appeal.

C. Even If Arguendo Plaintiff's Reconsideration Motion Were A Motion Seeking Section 473 Relief, The Absence Of A Proposed Amended Complaint Is Fatal To Extending The Time For Filing A Notice Of Appeal

Rule 8.108(c) provides if a "valid" motion to vacate judgment is filed within the time prescribed in rule 8.104, the deadline for appealing is extended to the earliest of 30 days after service of an order denying the motion or a notice of entry of that order; 90 days after the first notice of intention to move—or motion—is filed; or 180 days after entry of judgment.

A valid motion to set aside a judgment pursuant to section 473, subdivision (b) is a motion to vacate a judgment for purposes of rule 8.108(c). (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 108–109.) For a motion to vacate judgment to be "valid" for purposes of rule 8.108 (c), the motion must be based on "some recognized ground for vacation." (*Lamb v. Holy Cross Hospital* (1978) 83 Cal.App.3d 1007.)

We assume for argument's sake only that a trial court's erroneous sustaining of a demurrer to a complaint would be such a "ground[ ] for vacation." For a section 473, subdivision (b) motion to constitute a "valid" motion to vacate extending the deadline for filing an appeal, however, the motion must comply with the procedural requirements of section 473, subdivision (b). (Advisory Com. Com. to rule 8.108(c), *ante* at p. 9 ["the word 'valid' means only that the motion, election, request, or notice complies with all procedural requirements]".)

Section 473, subdivision (b) requires that a motion to set aside a judgment include a declaration of attorney fault for mandatory relief (Weil & Brown, Cal. Prac. Guide: Civil Procedure Before Trial (The Rutter Group 2018), ¶ 5:290, p. 5-76), and a proposed amended pleading for mandatory or discretionary relief (*id.* at ¶ 5:310.2, p. 5-93, ¶ 5:385, p. 5-111).[7] Indeed, section 473, subdivision (b) states that without a proposed pleading, the motion "shall not be granted."

As set forth in the factual and procedural background, *ante*, plaintiff's motion was devoid of a proposed amended pleading and the declaration attached to plaintiff's reply does not admit attorney fault, but instead faults the trial court, among others, for plaintiff's failure to amend the two causes of action before us. Plaintiff failed to provide the required proposed amended pleading even after defendants reminded the trial court and opposing counsel of the latter requirement.

Thus, even if styled as a motion to vacate pursuant to section 473, subdivision (b), plaintiff's motion for reconsideration did not extend the time for filing a notice of appeal.

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[7] Although plaintiff's motion for reconsideration itself does not specify whether plaintiff was seeking mandatory or discretionary relief, we note plaintiff appeared to have been seeking discretionary relief pursuant to section 473, subdivision (b) in describing that section's "principal purpose of vesting the court with the discretionary power to correct" a mistake.

D. Public Policies Favoring Resolution Of Appeals On The Merits And Granting The Right To Appeal In Doubtful Cases Do Not Rescue Plaintiff's Appeal

Plaintiff cites *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660 (*Hollister*) and *Slawinski v. Mocettini* (1965) 63 Cal.2d 70 (*Slawinski*) in support of California's "long-standing policy of" granting appeals in " 'doubtful cases.' " *Hollister* does not stand for the proposition plaintiff appears to advocate here—that we should ignore procedural defects in a motion for reconsideration to extend a jurisdictional deadline for filing an appeal.

As our Supreme Court observed in *Hollister*, "there is no decision of this court which may be accurately cited as authority for the proposition which defendants now advance. While applying principles of construction and interpretation in a manner consistent with the policy . . . of granting the right of appeal in doubtful cases, we have steadfastly adhered to the fundamental precept that the timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction." (*Hollister*, *supra*, 15 Cal.3d at pp. 669–670.)[8]

For all of the above reasons, we lack jurisdiction to consider plaintiff's appeal.

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[8] The *Hollister* court described *Slawinski* as a " 'doubtful' " case and containing "unnecessary and overbroad dicta." (*Hollister*, *supra*, 15 Cal.3d at pp. 673, 674.)

DISPOSITION

The appeal is dismissed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.